IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1173

FRANK GATTO, ADMINISTRATOR OF THE ESTATE OF SOPHIE GATTO AND INDIVIDUALLY,
Plaintiffs and as Assignees of Third Party Judgment-Appellees-Petitioners,

vs.

WALGREEN DRUG CO., ETC., ET AL., INCLUDING CURTIS, FRIEDMAN & MARKS, ETC.,
Defendants-Third Party Plaintiffs and Assignors of Third Party Judgment-Appellees-Respondents (actually Petitioners),

vs.

CALUMET FLEXICORE CORPORATION,
Third Party Defendant-Appellant-Respondent.

RESPONDENT'S ANSWER TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

THOMAS K. PETERSON,
230 West Monroe Street,
Chicago, Illinois 60606,
(312) 236-7722,
Attorney for Third-Party Defendant-Appellant-Respondent.

MEYERS AND MATTHIAS,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1173.

FRANK GATTO, ADMINISTRATOR OF THE ESTATE OF SOPHIE GATTO AND INDIVIDUALLY,
Plaintiffs and as Assignees of Third Party Judgment-Appellees-Petitioners,

vs.

WALGREEN DRUG CO., ETC., ET AL., INCLUDING CURTIS, FRIEDMAN & MARKS, ETC.,
Defendants-Third Party Plaintiffs and Assignors of Third Party Judgment-Appellees-Respondents (actually Petitioners),

vs.

CALUMET FLEXICORE CORPORATION,
Third Party Defendant-Appellant-Respondent.

RESPONDENT'S ANSWER TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

QUESTIONS PRESENTED.

1) Can the Courts be used for "sham trials" when there is no longer any "justiciable matters" or controversies because the Plaintiffs and Defendants have settled their differences?

2) In attempting to cover-up a secret settlement, does the judicial system allow the attorneys for the plaintiffs and defendants—third-party plaintiffs to subsequently file false pleadings, false affidavits, make false statements and seek improper Court orders?

THE STATEMENT OF THE CASE.

(The Petitioners "Statement of the Case" contains numerous misstatements and many deceptive statements of facts. No beneficial purpose could be derived in setting forth the true facts because of the illogical and/or nonchronological order used by the Petitioners. However, one example might suffice to illustrate the point. It is asserted that counsel for Calumet's counsel, third party defendant in an alledged common-law indemnity claim, made a ". . . threat that the plaintiffs would never live to see the day that they would collect any sum of monies from respondent. . . " (Petitioners' Pet. p. 4.) It is untrue that any threat was made. The deceptiveness is that the rest of the statement quoted is factual true—because any alleged claims for personal injuries that the Gattos as plaintiffs may have asserted against Calumet as a defendant were already barred by the Statute of Limitations of the State of Illinois. (App. to Pet. p. 25, 61 Ill. 2d 513, 514, 337 N. E. 2d 23, 24.)

(Set forth below is a factual and chronological statement of the pertinent facts. Those matters, set forth within parathesis and in italized type have been added for clarification purposes only.)

The Secret Agreement of August 1, 1969.

Before or during the first week of a 2½ week trial for personal injuries, the plaintiffs and two of the defendants (Lessors & Lessee) entered into a secret hand-written Agreement. *(The Illinois Supreme Court's opinion has the full agreement and the pertinent, preliminary history.* [*App. to Pet. pp. 26-28, 61 Ill. 2d 513; 337 N. E. 2d 23*].*)* The Agreement was identical to each defendant except for the amount of payment to be paid to the plaintiffs: $80,000.00 on behalf of the Lessors; and $15,000.00 on behalf of the Lessee. *(We will hereafter refer*

to the Lessor's Agreement.) The Agreement set forth that the plaintiffs' acknowledged receipt of the payment and that the payment was "solely as a purchase of peace." The plaintiffs "covenant and agree" not to execute against the Lessors. (App. to Pet. pp. 27-28.)

The second part of the secret Agreement stated that if the Lessors could recover more than $80,000.00 in their common-law indemnity action against a third-party defendant *(Calumet, the Respondent herein),* then the distribution would be as follows: (A) any amount up to the $80,000.00 would become and remain the sole property of the party that made the $80,000.00 payment to the plaintiffs on behalf of Lessors, and (B) any amount in excess of the $80,000.00 would be paid over by the third-party plaintiffs to the plaintiffs. The Lessors, at their sole option could "attempt to collect" the third-party judgment or permit the plaintiffs, at their own expense, to attempt to collect the third party judgment. (App. to Pet. pp. 27-28.)

The Disclosure of the Secret Agreement on February 22, 1973.

The Agreement of August 1, 1969 was kept secret during the trial and for 3½ years thereafter. When the trial court finally ruled that it would allow certain discovery to be undertaken by Calumet's attorneys, the attorneys for the Plaintiffs and Lessors, the Petitioners herein, produced on February 22, 1973 the secret Agreement of August 1, 1969. In a sworn affidavit dated March 31, 1973, one of the attorneys for the Petitioners herein, Robert Hultquist, stated that on February 22, 1973 ". . . the Agreement itself was *finally* brought to the attention of Mr. Peterson *(Calumet's attorney)* and the Court. . . ." (Abst. p. 138.)

Calumet's Second Amended Petition of April 14, 1973.

Thereafter, Calumet filed its Second Amended Petition setting forth that "subsequent to the agreement, plaintiffs had no justiciable cause of action *(against the Lessors)* to submit to

trial, verdict and judgment. Hence the trial was a sham and a charade and the resulting verdicts and *(plaintiffs')* judgments are void (as against the Lessors). As the underlying *(primary)* judgment is void, the *(Lessors')* judgment on the third-party action *(seeking common-law indemnity against Calumet)* is likewise void." (App. to Pet. p. 28, A. 104.)

The Relief Sought by Calumet.

The primary relief sought was to have the primary and third-party judgments declared void and to have the causes of actions dismissed nun pro tunc as of the date of the secret Agreement, August 1, 1969. (App. to Pet. p. 28.) The ultimate relief sought by Calumet was to take ". . . discovery *(so as)* to allow the court to impose appropriate sanctions against *(those)* persons who participated in the scheme to defraud Calumet . . . (. . . and [*who*] perpetrated the aforesaid fraud on the Court, the judicial system, and upon Calumet, its insurers [*and its attorneys*]) . . . an order assessing damages including attorneys' fees, and any other relief that justice required". (App. to Pet. p. 28, A. 107.)

Perpetrating the Cover-up by Acts of Fraud.

Regarding the "ultimate relief", seventeen examples of the Petitioners' acts in perpetrating the aforesaid fraud were set forth as excerpts from the then Record of the case. These were photostated for an Appendix which was filed with the Second Amended Petition on April 13, 1973. (A. 108-122.) A few of these examples will suffice. The true facts are also provided—many of which were set forth in the opinion of the Illinois Supreme Court. (App. to Pet. pp. 25-28)

To cover-up the secret Agreement, the Gattos and Lessors filed post-trial motions and notices of appeals against each other. In fact, they had settled and "purchased their peace" during the 1st week of the trial. (A. 111-114.)

After July 5, 1972, the attorneys and Frank Gatto filed affidavits and made representations to the courts and Calumet's attorney that 4-5 months after the trial, the Gattos had been loaned $60,000.00 dollars on behalf of the Lessors and that this money was the only money that had ever been received by the Gattos. In fact, there was no such loan; there was no payment of $60,000.00 five months after the trial, payments had been received during the trial in the sums of $80,000.00 on behalf of the Lessors and $15,000.00 on behalf of the Lessee, and there was no language concerning repayments of these amounts, conditionally or otherwise.

In affidavits, motions and representations before the Courts, the attorneys for the Gattos and Lessors contended that an assignment for the third-party judgment four to five months after the trial was the only agreement that had ever been entered into. (A. 114-115, A. 115, A. 118-119, A. 120-121.) In fact the hand-written agreement, which is dated during the first week of the trial, was signed by Mr. and Mrs. Gatto on each of the five pages, which was witnessed by their attorneys, and was also signed by each of the respective attorneys for the Gattos, the Lessors and the Lessee.

Two and one-half years after the trial, the attorneys for the Gattos and the Lessors filed a Petition with the Illinois Supreme Court seeking a Writ of Mandamus. Among other requests, it included a proposed order directing the clerk of the trial court to issue execution against the Lessors as defendants regarding the primary judgment of $120,000 in favor of the plaintiffs. (A. 119-120.) In fact, both parties were then represented by the same attorneys. The still secret Agreement of August 1, 1969 was entitled "An Agreement Not to Execute" with the plaintiffs covenanting against taking any execution.

Various motions and affidavits were filed. *(They are superfluous to the actual issue decided by the Illinois Supreme Court. Since the Petitioners have misrepresented the contents or failed to provide the facts as to motions and the trial court's rulings thereon, these facts must be provided. However, Calumet believes that if this is done within its "Argument Section", the brief will be shortened.)*

The Trial Court's Ruling on Calumet's Second Amended Petition.

On June 1, 1973, the trial court hearing the Second Amended Petition entered an Order confirming jurisdiction, denying certain relief, including the discovery sought by Calumet, and continued the cause (the Second Amended Petition) for a hearing on a motion to limit the amount of execution as to the third-party judgment. An appropriate motion was filed by Calumet. On August 21, 1973, an Order was entered denying all relief. An appeal followed.

The Illinois Appellate Court's Opinion.

The Illinois Appellate Court held that it did not have jurisdiction as to those matters covered under the Order of June 1, 1973. It did find that "The important and decisive element is that it is clear and certain that this Agreement was not disclosed to any of the courts involved in this proceeding until February 22, 1973, virtually three years and six months after its execution. The Agreement was not disclosed to the trial judge who presided over the original jury trial, to this *(Appellate)* court on the first appeal, to the *(Illinois)* Supreme Court in connection with the Petition for leave to appeal and in other matters brought before it *(the Petition for a Writ)* or to any of the three trial judges who heard some portions of the subsequent proceedings." (App. to Pet. p. 19, 23 Ill. App. 3d at 641, 320 N. E. 2d at 232.) The Appellate Court then directed that the execution upon the third-party judgment of $120,000.00 be limited to the sum of $80,000.00. (App. to Pet. p. 22.) In response to Calumet's petition for rehearing, the court further held that the statutory interest could commence only from the date of the disclosure of the secret Agreement on February 22, 1973 as that was the first time the amount due was actually known. (App. to Pet. p. 22A-B.)

The Illinois Supreme Court's Opinion.

The Illinois Supreme Court found that the appeal had been filed by Calumet at the proper time under the Illinois Supreme Court Rules. It further held that there was no need to remand the matter as the issues could be decided by it. It found that the Appellate Court's position that Calumet's attorney knew of the settlement was inconsistent with the Appellate Court's finding as to when the amount due was actually known. It noted that the "burden rested upon the persons who entered into the settlement to disclose it. It was not the responsibility of Calumet or of the trial judge to ferret out the facts. It has long been held that 'a suppression of the truth may amount to a suggestion of falsehood . . .'" (App. to Pet. p. 33.) The Illinois Supreme Court found:

> "If the Agreement was to be successful, it was imperative that it be concealed. It provided that the Lessor would pay $80,000.00 to the plaintiffs as 'purchase of peace.' After that agreement was entered into, there was no longer any controversy whatsoever remaining to be decided between these two parties. After the agreement was entered into, the Lessors no longer had a claim for third-party indemnification against Calumet in any amount in excess of $80,000, (*which would have to be brought on behalf of the Lessors' insurance carrier under Sec. 42 of the Illinois Civil Practice Act*) and the plaintiffs, as has been stated, had no right of action whatsoever against Calumet. Disclosure would have frustrated the scheme. While our constitution provides that 'Circuit Courts shall have original jurisdiction of all justiciable matters' (Ill. Const. 1970 art. VI, sec. 9), it does not confer jurisdiction to decide sham controversies. No 'justiciable matter' exists where two former adversary parties have settled their differences as to all issues they are purportedly litigating before the trial court. See generally *Moore* v. *Charlotte-Mecklenburg Board of Education* (1971), 402 U.S. 47, 91 S. Ct. 1292, 28 L. Ed. 2d 590; etc." (App. to Pet. pp. 33-34.)

The Court then noted that the secret Agreement had no relation to loan agreements. It concluded by reversing the judgments of the trial court and the Appellate Court without remandment.

ARGUMENT.

I.

NONCOMPLIANCE WITH RULE 23(f).

Petitioners have failed to show how they first raised their alleged denial of due process and specifically the lower court's adverse ruling thereon. Likewise they failed to cite how they preserved this point during the various appeals and the specific rulings by the higher courts. We suggest that they have not done this because they have never raised the contentions that they are now alleging as being a denial of due process.

II.

THE PETITIONERS ARE MANY DISTINCT PARTIES.

The Petitioners herein attempt to confuse (if not mistake) the position and rights of the various parties to the litigation. Each party has a distinct capacity. There is (1) the Gattos as plaintiffs; (2) the Gattos as Assignees of the third-party judgment five months after the verdicts; (3) the Lessors as defendants; (4) the Lessors (actually their insurer) as third-party plaintiff; (5) the Lessors (actually their insurer, CNA) as the Assignors of the third-party judgment.

If the secret Agreement had never been uncovered, and the Assignees (Gattos) had collected on the third-party judgment, distribution of those proceedings would have been pursuant to the terms of the "assignment" just as if the "assignment" had been made to a stranger to the suit. If the insurer of the Lessors had gotten any money from the Gattos, it would have been from the Gattos as the Assignees. The Gattos would never have paid or repaid the Lessors (actually their insurers) as "plaintiffs."

III.

THE COURTS CANNOT BE USED FOR SHAM TRIALS.

The ruling of the Supreme Court of Illinois did not revolve around the issue of who knew or did not know of the secret Agreement. *Arguendo,* if everyone in the world knew, including the judges and Calumet's attorney, once the "Agreement Not To Execute" dated August 1, 1969, was entered into, there was no longer any "justiciable issue" which could be decided by the court. Therefore, there was no "subject matter" over which the courts could have jurisdiction. Hence the claim of the plaintiffs against the Lessors had to be dismissed instanter. Any further proceedings between those two parties were a "sham". Any subsequent verdicts or judgments were void. And the third party judgment, which was only for indemnification of that void primary judgment, would likewise be void.

These are not questions of fact for a jury but are questions of law. There are no issues to be debated. The Supreme Court of Illinois properly ruled that the primary judgment was void and therefore the third party judgment was also void.

IV.

THE FALSE ISSUES REGARDING THE AFFIDAVITS.

The Petitioners attempt to raise an issue of an alleged denial of due process regarding certain affidavits. Of course, the affidavits only go to the question of the coverup. (No affidavit can change the effect of the secret Agreement.) The Petitioners have failed to provide this Court the full facts concerning the affidavits so that it can intelligently understand the proper emphasis to be given to the affidavits.

THE KNOWLEDGE OF CALUMET'S ATTORNEY.

The only knowledge that Calumet's counsel had was that ". . . It was my *'opinion'* that Attorney Quinn *(representing the Lessors)* probably offered up to $80,000 and that Attorney

Tracey *(representing the Lessee)* had indicated $15,000." (A. 24.) Calumet's attorney had no knowledge of the acceptance of the offer by the plaintiffs, the payments of the monies during the trial, the "purchase of peace", the agreement not to execute, the undertaking of the sham trial to impose false liability, or any of the other arrangements arising from the secret agreement.

THE PETITIONERS NEVER SOUGHT A TRIAL.

The Petitioners have failed to cite where they sought a trial concerning the credibility of the affidavits of Calumet's attorney —as they allegedly seek here before this Court. The issue was not raised by them either in the Illinois Appellate Court or in the Illinois Supreme Court. In their Petition for a Rehearing before the Illinois Supreme Court, they did state that "the decision of the Illinois Supreme Court has charged the attorneys for the plaintiffs, Lessors and Lessee with fraudulent conduct." They asked that the matter be referred to the Chicago Bar Association Grievance Committee for a full investigation, and that it include an inquiry into the affidavits filed by Calumet's attorney. Besides this, the "Conclusion" of their brief only requested that the trial court's judgments be reaffirmed or, alternatively, if the amount of the judgments was to be limited, then there should be a judicial determination as to whether the secret Agreement was a covenant not to sue rather than a loan agreement. (Gattos *et al's* Petition for Rehearing to the Supreme Court of Illinois, pp. 17-19, 24.) They did not seek a trial on any of the issues that they are now alleging.

THE PETITIONERS' FOUR COUNTER-AFFIDAVITS.

The four affidavits alluded to by the Petitioners were filed with the trial court on or about May 31, 1973 over the objections of Calumet's counsel. These objections were made on May 31 and June 1, 1973 at the hearings and are part of the original record. The objections included that the affidavits were being

filed two months after the time provided for by the trial court's original ruling, that the trial court was denying Calumet's specific request to take the discovery depositions of the affiants, that the affidavits contained hearsay and were irrelevant. The trial court stated on May 31, 1973 that he would allow the affidavits to be filed but that he was not relying on them in any of his decisions. Calumet's attorney pointed out that the affidavits should still be stricken because undoubtedly opposing counsel would attempt to use these affidavits in the Appellate Courts. (*How true!*) This motion was also denied. Calumet moved for leave to prepare and to file transcripts made during the trial which were not part of the court record. The transcripts would show that the affidavits should be discredited, that discovery depositions should be allowed or that the affidavits should be stricken. Calumet was given leave to file the transcripts but the remaining portion of the motion was denied. The transcripts were subsequently filed. (A. 175-183.)

V.

WHY THE COVER-UP IF THE JUDGES AND CALUMET'S ATTORNEY KNEW OF THE SECRET AGREEMENT?

Did the Judge Know?

The Petitioners contend that the trial judge knew of the secret Agreement. (*Their attorney had answered the question in the negative during the oral arguments before the Illinois Appellate Court.*) The Petitioners have quoted extensively Justice Goldberg of the Appellate Court as to his knowledge concerning the trial from his reading of the Record. However, they failed to quote him on this issue:

> "The important and the decisive element is that it clear and certain that this Agreement was not disclosed to any of the Courts involved in this proceeding until February 22, 1973, virtually 3 years and 6 months after its execution. The Agreement was not disclosed to the Trial Judge who presided over the original jury trial, to this court on the first appeal, to the Supreme Court (*of Illinois*) in connection with the petition for leave to appeal and in other matters

> brought before (*The Writ of Mandamus*) or to any of the three trial Judges who heard some portions of the subsequent proceedings. The only proportion of the transaction between these parties (*plaintiffs and Lessors*) ever disclosed to any Court until February 22, 1973, was the Assignment of Judgment which was entered into on January 27, 1970." (App. to Pet. p. 19.)

To Be Successful There Had to Be a Cover-up.

Petitioners have never been able to explain why they undertook the various acts that they did after the execution of the secret Agreement. Some of the acts were set forth in the Appendix filed with the Second Amended Petition by Calumet, *i.e.* the plaintiff and Lessors filing post trial motions and notices of appeals against each other. (A. 111-114.) Or why an attorney representing both parties would attempt to have the plaintiffs execute against the Lessors as a defendant, especially when there was a secret Agreement that the plaintiffs would not execute against the defendant. (A. 49-56.) Nor have they explained any of the other false statements, pleadings, affidavits.

It is apparent why the coverup, for as the Illinois Supreme Court noted:

> **"If the agreement was to be successful, it was imperative that it be concealed."** (App. to Pet. p. 33.)

It is just as apparent that the acts of the Petitioners were well thought out. They could only be considered to be acts which they knew were a fraud—a fraud upon the judicial system, upon the judges, upon opposing counsel, and upon many others who have been involved in this litigation. The misconceptions and misstatements they have made in their Petition to this Court only demonstrates that they have a philosophy that anything goes. It is this issue that this Court may want to consider. Certainly a Court always has the power (and the duty) to purge such activities from the judicial system. Not only would it affect these attorneys and the parties that they represent, but it would also set an example for others.

VI.

THE SECRET AGREEMENT IS BINDING BETWEEN THE PARTIES TO IT—BUT NOT AGAINST THE JUDICIAL SYSTEM NOR CALUMET.

In desperation, Petitioners contend that they have the constitutional right to enter into this type of contract. We do not dispute that, but they cannot enforce it against others. Nor can they contract to determine how the judicial system is to work. They settled their differences and that was the end of the litigation between the plaintiffs and the Lessors. Any subsequent judgments were void.

CONCLUSION.

The Petitioners have failed to show any basis for this Court to grant their Petition for a Writ of Certiorari to the Supreme Court of Illinois. The Petition should be denied.

Respectfully submitted,

THOMAS K. PETERSON,
230 West Monroe Street,
Chicago, Illinois 60606,
(312) 236-7722,
Attorney for Third-Party Defendant-Appellant-Respondent.

MEYERS AND MATTHIAS,
Of Counsel.